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No. 85-1551

In The

Supreme Court of the United States

October Term, 1986

ALAN J. KARCHER, as Speaker of the New Jersey General Assembly, *et al.*,

Appellants,

v.

JEFFREY MAY, individually, *et al.*,

Appellees.

On Appeal from the United States Court of Appeals for the Third Circuit

BRIEF OF APPELLANTS

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QUESTIONS PRESENTED

1. Whether Alan J. Karcher and Carmen A. Orechio, individually and as the representatives of the majority of the 200th New Jersey Legislature which enacted N.J.S.A. 18A:36-4, have standing to appeal from the judgment entered in this matter by the United States Court of Appeals for the Third Circuit.

2. Whether a state statute which permits public school students, before the opening exercises of each school day, to observe one minute of silence to be used solely at the discretion of the individual student for quiet and private contemplation or introspection violates the Establishment Clause of the First Amendment.

3. Whether in this First Amendment Establishment Clause case the court of appeals erred, as a matter of law, by failing to engage in plenary review of the district court's finding under this Court's ruling in *Bose Corp. v. Consumers Union,* 466 U.S. 485 (1984).

PARTIES TO THE PROCEEDING

Appellants: In addition to Alan J. Karcher, the appellants herein (defendants-intervenors-appellants in the court of appeals) are the New Jersey General Assembly, Carmen A. Orechio, as President of the New Jersey Senate, and the New Jersey Senate (hereinafter the "Legislature").

Saul Cooperman, the Commissioner of the New Jersey Department of Education, the New Jersey Department of Education, the Edison Township Board of Education and the Old Bridge Township Board of Education were all named as defendants in the original complaint, but took no active role in the proceedings before either the district court or court of appeals.

Appellees: In addition to Jeffrey May, individually, Jean Ross, as natural parent of Damon Ross, an infant, and Jean Ross, individually; Bonnie Schorske, as natural parent of Mark Tulloss, an infant, and Bonnie Schorske, individually; Brenda Butler, individually, and Gary Drew, individually, were appellees in the court of appeals.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	1
STATUTE AND CONSTITUTIONAL PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
A. Facts	2
B. Decision Of The District Court	6
C. Decision Of The Court Of Appeals	8
SUMMARY OF ARGUMENT	9
A. Justiciability Issue	10
B. Establishment Clause Issue	11
C. Standard Of Review Issue	13
ARGUMENT:	
I. THERE EXISTS ON THIS APPEAL A JUSTICIABLE CASE OR CONTROVERSY	14
(A) Alan Karcher, Carmen Orechio And The 200th Legislature Have An Abiding And Continuing Interest In The Subject Matter Of This Case Sufficient To Sustain Standing To Prosecute This Appeal	15
(B) As Proper Party-Defendants Below, Alan Karcher, Carmen Orechio And The 200th Legislature Have A Statutory Right To Maintain This Appeal	22

TABLE OF CONTENTS—Continued

Page

(C) The Action Of The Court Below, In Intrusively And Incorrectly Probing The Legislative Process By Which The MOS Was Enacted And By Holding The Law To Be Invalid, Constitutes "Judicial Nullification" So As To Give Standing To The Majority Of The 200th Legislature To Seek Appellate Review 23

II. THE COURT OF APPEALS MAJORITY ERRED AS A MATTER OF LAW IN HOLDING NEW JERSEY'S MOMENT OF SILENCE LAW UNCONSTITUTIONAL BASED UPON A FINDING THAT THE MOS LACKED ANY PLAUSIBLE SECULAR PURPOSE 27

(A) The Constitutional Standard: The Three-Part Test 27

(B) The Majority Of The Court Of Appeals Erred In Its Interpretation And Application Of The Purpose Prong Of This Court's Tripartite Establishment Clause Test By Accepting And Endorsing The Basis By Which The District Court Determined That The MOS Lacked Any Plausible Secular Purpose 29

(C) Under A Proper Purpose Analysis, Giving Due Regard To All Of This Court's Teachings Under The Establishment Clause, The MOS Is Constitutional 38

III. THE COURT OF APPEALS ERRED IN APPLYING A "CLEARLY ERRONEOUS" STANDARD TO REVIEW THE TRIAL COURT'S "FACTUAL" DETERMINATION THAT THE STATUTE LACKS A SECULAR PURPOSE 43

CONCLUSION 47

TABLE OF AUTHORITIES

Page(s)

CASES

Acheson v. Fujiko Furusho, 212 F.2d 284 (9th Cir. 1954) 18

Ameron v. U.S. Army Corps of Engineers, 787 F.2d 875 (3d Cir. 1986) 23

Arizona v. California, 283 U.S. 423 (1931) 34

Bender v. Williamsport Area School District, — U.S. —, 106 S.Ct. 1326 (1986) 20, 46

Bob Jones University v. United States, 461 U.S. 574 (1983) 45

Bose Corp. v. Consumers Union, 466 U.S. 485 (1984) 9, 13, 14, 28, 43, 44, 45, 46

Brasslet v. Cota, 761 F.2d 827 (1st Cir. 1985) 46

Coleman v. Miller, 307 U.S. 433 (1939) 23

Committee for Public Education v. Regan, 444 U.S. 646 (1980) 42

Committee for Public Education v. Nyquist, 413 U.S. 756 (1973) 39

Daniel v. Family Secur. Life Ins. Co., 336 U.S. 220 (1949) 31

Diamond v. Charles, — U.S. —, 106 S.Ct. 1697 (1986) 21, 23

Director, Office of Workers' Compensation Programs, etc. v. Perini North River Associates, 459 U.S. 297 (1983) 22

Epperson v. Arkansas, 393 U.S. 97 (1968) 39, 41

Estate of Thornton v. Caldor, Inc., 472 U.S. 703 (1985) 12, 21, 37, 41, 45

Everson v. Board of Education, 330 U.S. 1 (1947) 39, 41, 42

Ex parte Hague, 105 N.J. Eq. 134, 147 A. 220 (1929) 18

TABLE OF AUTHORITIES—Continued

Page(s)

Fiske v. Kansas, 274 U.S. 280 (1927) 45

Fletcher v. Peck, 10 U.S. 87 (1810) 34

Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91 (1979) 23

Gomillion v. Lightfoot, 364 U.S. 339 (1960) 33

Grosjean v. American Press Co., 297 U.S. 233 (1936) 33

INS v. Chadha, 462 U.S. 919 (1983) 23

Jacabellis v. Ohio, 378 U.S. 184 (1984) 47

Korioth v. Briscoe, 523 F.2d 1271 (5th Cir. 1975) 20

Larson v. Valente, 456 U.S. 228 (1982) 38

Lebron v. Washington Metro Area Transit Authority, 749 F.2d 893 (D.C. Cir. 1984) 46

Lemon v. Kurtzman, 403 U.S. 602, 612-613 (1971) 10, 27, 28, 38, 39, 44

Lynch v. Donnelly, 465 U.S. 668 (1984) 12, 33, 39, 42, 45

Marsh v. Chambers, 463 U.S. 783 (1983) 38

McCray v. United States, 195 U.S. 27 (1904) 34

McGowan v. Maryland, 366 U.S. 420 (1961) 38, 41, 42

McMullen v. Carson, 754 F.2d 458 (9th Cir. 1984) 46

McRae v. Mathews, 421 F.Supp. 533 (E.D.N.Y. 1976), *appeal dismissed, Buckley v. McRae*, 433 U.S. 916 and *vacated, Califano v. McRae*, 433 U.S. 916 (1977), *reh'g denied, Califano v. McRae*, 434 U.S. 881 (1977) and on *remand, McRae v. Califano*, 491 F.Supp. 630 (E.D.N.Y. 1980), *rev'd Harris v. McRae*, 448 U.S. 297 (1980), *rehearing denied, Harris v. McRae*, 448 U.S. 917 (1980) 25, 26

Miller v. California, 413 U.S. 15 (1973) 46

Miller v. Fenton, — U.S. —, 106 S.Ct. 445 (1985) 47

TABLE OF AUTHORITIES—Continued

Page(s)

Mueller v. Allen, 463 U.S. 388 (1983) 12, 36, 42

Munro v. Socialist Workers Party, — U.S. —, 107 S.Ct. 533 (1986) 45

Palmer v. Thompson, 403 U.S. 217 (1971) 35

Presbyterian and Reformed Publishing Co. v. Commissioner of Internal Revenue, 743 F.2d 148 (3d Cir. 1984) 45

Poovey v. Edminsten, 526 F.Supp. 759 (E.D.N.C. 1981) 20

San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973) 30

S&E Contractors v. United States, 406 U.S. 1 (1972) 41

School Dis. of Abington Township v. Schempp, 374 U.S. 203 ..... 36, 39

Schweiker v. Hogan, 457 U.S. 569 (1982) 31

Sloan v. Lemon, 413 U.S. 825 (1973) 39

Stone v. Graham, 449 U.S. 39 (1980) 39, 40

United States v. Merrill, 746 F.2d 458 (9th Cir. 1984) 46

United States v. O'Brien, 391 U.S. 367 (1968) 32, 33, 34, 35

Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464 (1982) 26

Wallace v. Jaffree, 472 U.S. 38 (1985) 8, 10, 11, 17, 36, 37, 38, 39, 40, 41, 42

Warth v. Seldin, 422 U.S. 490 (1975) 26

Washington v. Davis, 426 U.S. 229 (1976) 33

Widmar v. Vincent, 454 U.S. 263 (1981) 42

Witters v. Washington Dept. of Services for the Blind, — U.S. —, 106 S.Ct. 748 (1986) 45

Zorach v. Clauson, 343 U.S. 306 (1952) 30, 31, 42

TABLE OF AUTHORITIES—Continued

Page(s)

UNITED STATES CONSTITUTION CITED

First Amendment ..... *passim*

Fourteenth Amendment 2, 4, 46

STATUTES CITED

28 U.S.C. § 1254(2) 1

28 U.S.C. § 1254(b) 11, 22

28 U.S.C. § 2201 4

28 U.S.C. § 2202 4

42 U.S.C. § 1983 4

N.J.S.A. 18A:36-4 ..... 1, 2, 3, 28, 43

RULES CITED

Fed.R.Civ.P. 24(a)(2) 24

Fed.R.Civ.P. 26(c) 5

Fed.R.Civ.P. 52(a) 13, 14, 43, 47

OTHER AUTHORITIES

Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics (1962)* 36

Choper, *Religion in the Public Schools; A Proposed Constitutional Standard*, 47 *Minn. L. Rev.* 329, 371 (1963) 36

Freund, *The Legal Issue, in Religion and the Public Schools*, 23 (1965) 36

Fitzgerald, *Legislative Manual, State of New Jersey* (1986), at 358-360 16

Kauper, *Prayer, Public Schools and the Supreme Court*, 61 *Mich. L. Rev.* 1031, 1041 (1963) 36

Tribe, *American Constitutional Law* § 14-6 at 829 (1978) 36

Wright, Miller & Kane, *Federal Practice and Procedure*, Civil 2d § 1960 at 570-572 (1986) 18

This appeal[1] is taken from the judgment and opinion of the United States Court of Appeals for the Third Circuit entered on December 24, 1985, affirming the decision of the United States District Court for the District of New Jersey and declaring unconstitutional N.J.S.A. 18A:36-4, under the Establishment Clause of the First Amendment to the United States Constitution. Appellants respectfully ask this Court to reverse the judgment of the United States Court of Appeals for the Third Circuit entered in this matter.

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OPINIONS BELOW

The majority and dissenting opinions of a panel of the United States Court of Appeals for the Third Circuit dated December 24, 1985 are reported at 780 F. 2d 240 (3d Cir. 1985). The opinion of the United States District Court for the District of New Jersey dated October 24, 1983 is reported at 572 F. Supp. 1561 (D.N.J. 1983).[2]

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JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was entered on December 24, 1985. (J.S.A. 103a). The jurisdiction of the Supreme Court of the United States to review the decision by direct appeal is conferred by 28 U.S.C. § 1254(2). Appellants' notice of appeal was filed in this Court on March 19, 1986. (J.S.A. 106a).

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[1] On January 27, 1987, this Court granted further review of this appeal but postponed ruling on the question of jurisdiction until a hearing on the merits.

[2] References herein to the opinions and judgments below will be by citation to the Appendix of appellants' Jurisdictional Statement (hereinafter "J.S.A.") filed in this Court on March 19, 1986. References to the Joint Appendix filed herewith will be designated "J.A."

STATUTE AND CONSTITUTIONAL PROVISIONS INVOLVED

Title 18A, New Jersey Statutes Annotated, Chapter 36-4 (West 1982), commonly referred to as the Moment of Silence Statute (hereinafter the "MOS"), provides that:

> Principals and teachers in each public elementary and secondary school of each school district in this State shall permit students to observe a 1 minute period of silence to be used solely at the discretion of the individual student, before the opening exercises of each school day for quiet and private contemplation or introspection.

The First Amendment to the United States Constitution (in pertinent part), provides that:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.

The Fourteenth Amendment to the United States Constitution (in pertinent part), provides that:

> Section 1.
> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

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STATEMENT OF THE CASE

A. Facts

The MOS was introduced in the New Jersey General Assembly (hereinafter "Assembly") in March of 1982 as Assembly Bill 1064 by 55 sponsoring assembly persons. (J.S.A. 110a). Aside from its text, the only published official statements by the Legislature regarding the MOS

were contained in its preamble and in an official statement which accompanied the Bill when it was voted into law.[3]

Initially, the Bill passed both the Assembly and the Senate and was forwarded to Governor Thomas Kean for signature. Governor Kean vetoed the Bill and returned it to the Assembly. In his letter returning the bill to the Assembly, the Governor stated concern over the Legislature's motive in passing the MOS and questioned the necessity for a law mandating a minute of silence in public schools for student contemplation and introspection. (J.A. 381).

On December 13, 1982, the Assembly voted to override the Governor's veto by a vote of 57 to 17 (J.A. 391), and on December 16, 1982, the Senate voted to override the veto by a vote of 27 to 8. (J.A. 389). The MOS became law immediately.

After its enactment, the MOS was communicated to all school districts by the New Jersey Department of Education without administrative guidelines or comment. (J.A. 22-23). The MOS was implemented in some school districts prior to the 1982 Christmas recess and reaction to its enactment and implementation by some students, parents and a teacher precipitated the filing of the instant lawsuit.

On January 10, 1983, plaintiffs-appellees (hereinafter the "plaintiffs"), parents, students and a teacher, brought suit against the Commissioner of the Department of Edu-

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[3]Those statements provided respectively as follows:

> An Act to allow students of public schools to participate in a 1 minute period of silence before the opening of each school day and supplementing chapter 36 of Title 18A of the New Jersey Statutes.
>
> * * *
>
> This Bill allows each student to participate in a 1 minute period of voluntary silence to be used solely at the discretion of the individual student.

(J.S.A. 110a).

cation, the New Jersey Department of Education, the Edison Township Board of Education, and the Old Bridge Township Board of Education, pursuant to the provisions of 42 U.S.C. § 1983 and 28 U.S.C. §§ 2201 and 2202, seeking declaratory and injunctive relief. (J.A. 13). The plaintiffs alleged that the MOS: violated the Establishment Clause of the First Amendment; violated the Due Process provisions of the Fourteenth Amendment; was void on its face; and violated provisions of the New Jersey Constitution.[4]

With the filing of the complaint, plaintiffs moved for a temporary restraining order (J.A. 47) supported, *inter alia*, by plaintiffs' affidavits, a brief and an appendix of exhibits which included copies of previously considered legislation dating back to 1970 and selected newspaper articles purporting to report statements of various legislators, editors, and citizens with regard to both the MOS and prior bills, and the affidavit of Reverend Dudley E. Sarfaty setting forth his recollection of remarks he overheard during legislative debates prior to the Legislature's override of the Governor's veto. (J.A. 23-46). While the district court initially found the MOS both neutral on its face and not by its terms mandating prayer, the court nonetheless entered a temporary restraining order after an examination of the materials plaintiffs had submitted, which the court concluded revealed an improper legislative intent in enacting the MOS. (J.A. 50).

On January 18, 1983, in recognition of the fact that no named party-defendant would actively oppose plaintiffs' suit, and with the consent of plaintiffs, the district court granted the intervention motion of Alan J. Karcher;

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[4] At trial, plaintiffs presented no evidence regarding alleged violations of the New Jersey Constitution and neither the district court nor the court of appeals addressed this particular claim in their respective opinions. As a consequence, the claim is deemed waived on this appeal.

the New Jersey General Assembly; Carmen A. Orechio; and the New Jersey Senate. (J.A. 53; Mot. to Dism. or Aff. App. 11a). Thereafter, the temporary restraints were continued by consent of the parties pending a hearing on the merits.

On January 26, 1983, plaintiffs served interrogatories, and a notice to take the depositions of fifty current and former legislators. Plaintiffs sought to require the named legislators to: (1) affirm statements reported in the news articles annexed to the plaintiffs' application for the temporary restraining order; (2) provide statements as to their motivation, understanding or purpose in introducing certain legislation; (3) disclose material that they had relied upon in considering not only the current law but, also previously proposed legislation; (4) provide copies of any documentation they had received and reviewed, as well as to provide documentation they had prepared in form of correspondence with any constituents, relating to the current law and to the prior bills and a joint resolution that plaintiffs identified in their notice of deposition.

In response to a motion by the Legislature (J.A. 58) for an order suppressing discovery on the basis of legislative privilege and under the provisions of FED. R. CIV. P. 26(c), the district court concluded, without deciding the issue of legislative privilege, that it would be inappropriate for legislators to be required to give testimony concerning their legislative activities. In accordance with its holding, the court limited the information that the Legislature was required to supply in discovery.

On April 20, 1983, the district court granted plaintiffs' motion *in limine* permitting plaintiffs to offer into evidence at trial newspaper articles containing fragmentary "statements" of a handful of legislators, editorials, citi-

zens' letters, and reports on the MOS' implementation. The court, over the objection of the Legislature on the grounds of violations of legislative privilege and federal evidence rules pertaining to hearsay, granted the motion on the ground that the material would help establish the "overall public perception of the activity mandated by the statute as secular or religious in nature." (J.A. 120).

B. Decision of the District Court

Trial on the merits commenced on September 13, 1983. Plaintiffs presented live testimony from thirteen witnesses, by stipulation introduced the previously filed affidavits of the plaintiffs (J.A. 129) and, over the continuing objections of the Legislature, introduced a multitude of documents containing copies of bills previously considered by prior independent New Jersey Legislatures dating back to 1970, newspaper articles containing statements of a handful of legislators, editorials, citizens' letters, photographs and news reports of the MOS' implementation. (App. Vol. V).[5] The plaintiffs' proofs consisted of predictions as to how the MOS might be used by teachers and students for religious purposes (J.A. 147; 157); what had allegedly been said by *some* legislators both during and outside legislative debates (J.A. 261-272; 272-283; 367-375); the opposition positions of three educator associations (J.A. 284-300; 375-380; 403); some parent and student reactions to the law (J.A. 23-46; 227-260); the reaction of a teacher (J.A. 38); and opinions as to the law's lack of educational utility. (J.A. 38-41; 188-226; 238-239; 301-312). Two students described how the MOS had been implemented in their classrooms. (J.A. 24-27).

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[5] Because of their size, the newspaper articles admitted into evidence at trial could not be printed in the Joint Appendix filed with this Court. Citation to those articles will be denoted by reference to the appendix volume wherein they appear in the Joint Appendix filed with the court of appeals, e.g., "App. Vol. V."

The Legislature produced testimony from five witnesses. The Legislature's proofs consisted of a psychologist who reported the results of his research project to determine the objective effect of a moment of silence exercise in actual operation (J.A. 313-326); two Sayreville, New Jersey, school teachers who described the operation of a moment of silence exercise in their school district for over ten years (J.A. 327-332; 333-350); a professor of sociology and education who described the pedagogical utility of a moment of silence to create a transition between non-school and school (J.A. 352-360); and a professor of journalism who testified regarding the inability to accurately determine public perception or reliably predict public reaction from examination of the news articles presented by the plaintiffs. (J.A. 361-366). The Legislature also presented a videotape of a December 17, 1982, WCBS-TV (New York) news report concerning the Sayreville practice described by the two teachers. (App. Vol. V).

Based on findings of fact and conclusions of law embodied in an opinion filed on October 24, 1983 and reported at 572 F.Supp. 1561 (D.N.J. 1983), (J.S.A. 62a-100a), the district court issued a decision granting plaintiffs' application for an order permanently enjoining the implementation of the MOS and declaring it unconstitutional on its face and as applied.[6] (J.S.A. 101a). Among other things, the district court found that the MOS "does not have a bona fide secular purpose and, in fact, has a religious purpose." (J.S.A. 94a). Moreover, the court concluded that the MOS "advances religion . . . by mandating a period when all students and teachers must assume the

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[6] Despite its opinion, the order entered by the district court failed to provide for a permanent injunction against implementation of the MOS, but instead merely declared the MOS unconstitutional. (J.S.A. 101a).

traditional posture of prayer of some religious groups." (J.S.A. 94a). Accordingly, the district court concluded that the MOS was unconstitutional because it lacked an "overwhelmingly obvious and important secular purpose." (J.S.A. 94a), it had the effect of both advancing and inhibiting religion (J.S.A. 94a-95a) and that implementation of the MOS would cause "divisiveness among and between religious groups." thereby causing governmental entanglement with religion. (J.S.A. 98a).

C. Decision of the Court of Appeals

Following briefing, the court of appeals (panel composed of Circuit Judges John Gibbons and Edward Becker and District Judge Marvin Katz, sitting by designation) heard oral argument on October 26, 1984. In June of 1985, the panel requested that the parties submit supplemental letter briefs commenting upon the effect, if any, that this Court's intervening decision in *Wallace v. Jaffree*, 472 U.S. 38 (1985), had upon the issues then pending before the panel. After receipt of the parties' respective submissions, the panel ordered reargument on August 13, 1985.

On December 24, 1985, a divided panel affirmed the district court's conclusion that the MOS was unconstitutional. Judge Gibbons, writing for the majority, sustained the district court's conclusion on a narrower ground, and by a markedly different analysis, than that employed by the district court. In the process, the majority opinion rejected the district court's analysis under both the "effect" and "entanglement" prongs, (J.S.A. 16a-22a) and rested its decision *solely* on its interpretation of this Court's test under the "purpose" prong. (J.S.A. 23a-30a).

Circuit Judge Becker, in a dissenting opinion, sharply broke with the majority over its interpretation of this Court's "purpose" test and concluded that the MOS was

constitutional. (J.S.A. 31a-60a). After grouping the "evidence" presented to the district court into five categories: "testimony of three witnesses who were present at legislative hearings; newspaper accounts of the hearings; evidence of the perceptions of various citizens and citizens' groups of New Jersey about the statute's purpose; expert testimony about the pedagogical value of the statute; and seventeen prior bills proposing moments of prayer or moments of silence," and then engaging in a thorough review of this so-called evidence, Judge Becker concluded that "none of the evidence on which the plaintiffs rely is sufficient, separately or cumulatively, to prove an absence of any secular purpose behind the statute." (J.S.A. 58a). Indeed, Judge Becker noted that even the testimony of plaintiffs' witnesses concerning statements purportedly made by some legislators during hearings on the MOS was "equivocal because each of the witnesses also testified to legislators' statements that the statute had a secular purpose." (J.S.A. 48a-49a).

Judge Becker further disagreed with the majority analysis on the grounds that in reaching its conclusion that the MOS lacked a secular purpose, the majority had: (1) either applied the incorrect standard of review in contravention to this Court's decision in *Bose Corp. v. Consumers Union*, 466 U.S. 485 (1984) (J.S.A. 44a-47a) or (2) even assuming a more deferential standard of review was applicable, the majority had inexplicably ignored sufficient relevant evidence in the record which revealed that the district court had clearly erred in finding that the MOS had no secular purpose. (J.S.A. 48a-49a).

SUMMARY OF ARGUMENT

This case involves a determination of whether New Jersey's moment of silence statute, which requires that all

principals and teachers in each public school in New Jersey "permit students to observe a 1 minute period of silence to be used solely at the discretion of the individual students, before the opening exercises of each school day for quiet and private contemplation or introspection," violates the First Amendment's prohibition against the enactment of a "law respecting an establishment of religion." However, the issues presented go far beyond one state and one statute,[7] and raise substantial questions in the area of First Amendment Establishment Clause jurisprudence as well as the important issue of the proper standard and scope of review to be applied by federal appellate courts in such cases.

Appellants believe that, in invalidating a neutral statute which is facially and operationally constitutional, both the district court and court of appeals majority fundamentally erred in interpreting and applying this Court's teachings under the purpose prong of its Establishment Clause test enunciated in *Lemon v. Kurtzman*, 403 U.S. 602, 612-613 (1971). Given the statute's facial and operational neutrality towards religion, the Legislature's provision for a one minute period of silence to be observed by public school students in New Jersey, at the commencement of the school day, does not run afoul of the Constitution.

A. JUSTICIABILITY ISSUE. Alan Karcher, the Speaker of the 200th New Jersey General Assembly and Carmen Orechio, the President of the 200th Senate, who both are presently members of the 202nd New Jersey Legislature, have standing, individually and as representatives

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[7] In *Wallace v. Jaffree*, 472 U.S. at 70 n.1 (1985) (O'Connor, J., concurring), it was noted that New Jersey and some 24 other states have enacted statutes which "permit or require public school teachers to have students observe a moment of silence in their classrooms."

of the majority of the 200th Legislature, to prosecute this appeal. Messrs. Karcher and Orechio intervened below as full parties, as well as in their capacities as representatives of the majority of the 200th Legislature, to defend the MOS law which had been abandoned by the state executive branch and left defenseless against constitutional attack by the named party-defendants. Messrs. Karcher and Orechio have continued to act as the representatives of the 200th Legislature throughout the entire course of this litigation, and their present interests in representing that legislative majority are identical, if indeed not enhanced, to the interests they possessed at the time of the original intervention in this case. As proper parties in the court of appeals, Messrs. Karcher and Orechio and, through them, the 200th Legislature have statutory authority to seek review in this Court under 28 U.S.C. § 1254(b).

In their motion to dismiss or affirm, appellees contend that the current New Jersey Legislature, the 202nd, is the "sole agency who could have processed this appeal." (Mot. to Dism. or Aff. at 3). Since the leadership of that body has decided not to participate in this appeal, appellees reason that the current Legislature's withdrawal leaves this Court without a justiciable issue. However, since the current Legislature did not enact the MOS statute, it has no authority to abate the appeal. The preferences of its current presiding officers are insufficient and ineffective to withdraw this appeal.

B. ESTABLISHMENT CLAUSE ISSUE. New Jersey's MOS statute presents for review a permissive and facially neutral statute, the constitutionality of which this Court has not heretofore passed upon. In *Wallace v. Jaffree*, six members of this Court strongly suggested that a "straightforward" moment of silence statute would pass muster under the First Amendment, although the issue was

not then before the Court for decision. The New Jersey MOS statute places that issue squarely before this Court for decision.

The court of appeals panel was unanimous on a number of issues, including its views: that the MOS was "permissive only" as to student participation (J.S.A. 15a; 31a); that the district court's analysis under "entanglement" was contrary to this Court's recent pronouncements in *Lynch v. Donnelly*, 465 U.S. 668 (1984) and *Mueller v. Allen*, 463 U.S. 388 (1983) (J.S.A. 17a; 31a), and; that even if the MOS was viewed as an accommodation to religion, the "effect" of the statute would not be to inhibit or advance religion. (J.S.A. 18a; 31a). However, it sharply divided over the proper mearing and application of this Court's Establishment Clause "purpose" inquiry. The majority concluded that even though it would not sustain a finding that the statute's purpose was to encourage prayer over other alternatives (J.S.A. 29a), it was constrained to "accept" the trial court's finding that the Legislature's purpose in enacting the MOS was religious "at least to the extent of requiring school districts to accommodate those students desiring the opportunity to engage in prayer at some point during the school day." (J.S.A. 27a-28a). According to the majority, in affirming the district court, it was guided by this Court's decision in *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985). (J.S.A. 29a-30a).

Circuit Judge Becker's dissent carefully outlined a purpose analysis which had no common features with either the majority or the district court's approach. Applying that analysis, Judge Becker detailed why the trial court's finding that the MOS lacked a secular purpose was "unsupportable" under either a plenary review or under a

more deferential standard, as had been employed by the majority under FED. R. CIV. P. 52(a). (J.S.A. 44a-60a).

The narrow acceptance by the court of appeals majority of the trial court's finding of no secular purpose incorporates (albeit in some respects *sub silentio*) a ratification of a host of substantial and fundamental errors in understanding and implementing a plethora of this Court's Establishment Clause decisions. For example, the Third Circuit majority opinion, in affirming the district court's conclusion, ratifies the trial court's unexplained rejection of a number of this Court's decisions validating the concept of a "plausible secular purpose"; sanctions the trial court's errant inquiry into subjective motives of legislators; validates the trial court's rejection of fundamental presumptions and rules of statutory construction; endorses the trial court's acceptance and reliance upon wholly inadmissible hearsay; and approves the trial court's utilization of constitutionally irrelevant evidence to question the wisdom of the New Jersey Legislature's action in enacting the MOS.

The constitutionality of the MOS is settled under the decisions of this Court, because the act has a legitimate secular purpose of providing for a transition period at the commencement of the school day, a purpose which is strongly supported by the act's expressed language. Judge Becker, in dissent, compellingly set forth the reasons why the MOS is constitutional.

C. STANDARD OF REVIEW ISSUE. The panel majority's unexplained application of the "clearly erroneous" standard of review is in clear conflict with this Court's decision in *Bose Corp. v. Consumers Union*, and is logically inconsistent with its own conclusions as to the insufficiency of the trial court's determinations under the "effect" and "entanglement" prongs of this Court's Estab-

lishment Clause test. The court of appeals majority ignored the message of this Court that, in cases raising First Amendment issues, an appellate court has an obligation to make an independent examination of the whole record. The inexplicable application of the wrong standard of review was error compounded by a misapplication of even that standard, and unless corrected will serve to foster additional errors in the understanding and application of not only this Court's decision in *Bose,* but the traditional standard of review provided by FED. R. CIV. P. 52(a).

ARGUMENT

I. THERE EXISTS ON THIS APPEAL A JUSTICIABLE CASE OR CONTROVERSY.

Distilled to its essence, the jurisdictional question presented is whether Alan Karcher, the Speaker of the General Assembly, and Carmen Orechio, the President of the Senate of the 200th Legislature of the State of New Jersey, have standing to prosecute an appeal to this Court, where:

> (1) Karcher, Orechio and the Legislature which enacted the MOS were required to intervene below by reason of the failure of the state executive branch to defend the laws of the State; and
>
> (2) But for these parties' active intervention below, there would have been no participating party-defendant and, therefore, no possibility of an adjudicatory trial on the merits; and
>
> (3) Where the successive Legislatures of the State of New Jersey have taken no official action of any kind to moot the controversy or to defeat this appeal; and
>
> (4) Where the issues raised by this case and this appeal involve, not merely the constitutional validity of the subject statute, but also critical, constitutionally-based questions as to the proper and per-

missible scope and manner of review by the federal courts as to the actions of the 200th Legislature.

(A) Alan Karcher, Carmen Orechio and the 200th Legislature Have An Abiding and Continuing Interest in the Subject Matter of this Case Sufficient to Sustain Standing to Prosecute this Appeal.

Messrs. Karcher, Orechio and, through them, the 200th Legislature were unquestionably parties to this case.[8] That body intervened, through its presiding officers, Karcher and Orechio, when it became apparent that the executive branch had seen fit to abandon the law—a law which, absent legislative intervention, would be left defenseless against constitutional attack. The district court granted the intervention by Karcher and Orechio and their respective legislative houses which had passed the enactment; save for some quibbling about the discovery implications of the intervention, the plaintiffs consented to the intervention.[9] The interests of the intervenors in defending the legislation orphaned by the executive branch has not changed since the time of intervention.

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[8] The New Jersey Constitution provides that:

> Each legislature shall be constituted for a term of 2 years beginning at noon on the second Tuesday in January in each even numbered year. . . .

N.J. Const. (1947), art. 4, § 1, par. 3. The 200th, 201st and 202nd New Jersey Legislatures commenced on January 12, 1982, January 9, 1984, January 14, 1986, respectively.

[9] It is certainly anomalous that the appellees, who undoubtedly initially welcomed intervention by appellants so that the matter could proceed to a trial on the merits on a truly adversarial basis, now, in order to preserve a questionable result below, complain that the selfsame parties should be debarred from concluding the adjudicatory process by way of a full range of appeal with respect to an issue which all parties have agreed is of primal public importance. Unlike the more typical situation of intervention by an essential stranger to the legislative process, here active participation by the appellants was a prerequisite to the matter proceeding to a plenary trial on the merits.

Any notion that Messrs. Karcher and Orechio were simply in this case in their official capacities is inconsistent with the limited power and authority provided to the presiding officers of the Legislature pursuant to its rules. Examination of the Rules of the General Assembly and Senate reveals that the duties of the speaker and president are administrative in nature and do not empower them to institute litigation on behalf of their respective bodies.[10] Accordingly, Karcher and Orechio could have only intervened with and for the 200th Legislature, of which body they were presiding administrative officers.[11]

Messrs. Karcher and Orechio's intervention as full parties and as representatives of the majority which enacted the law over a gubernatorial veto is reflected in the transcript of the intervention hearing before the district court on January 18, 1983. (Mot. to Dism. or Aff. App. 11a). At that time, counsel who appeared on behalf of the intervenors advised the district court that he was moving on behalf of Karcher and Orechio as presiding officers "to be made a party, direct defendant in this matter." (Mot. to Dism. or Aff. App. 13a). The intervention of Karcher and Orechio as party-defendants was granted by the court and the intervention order reflects the intervention of those

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10 The Rules of the General Assembly delineate the following administrative duties to the speaker: chair meetings of the assembly; put questions before the assembly; appoint committees; prepare a Calendar of Bills and Resolutions and sign certificates as to passage by the assembly of all acts and joint resolutions. Fitzgerald, *Legislative Manual, State of New Jersey* (1986), at 358-360. The Rules of the Senate provide likewise. *Id.* at 319-321.

11 If the appellees' challenge to Karcher and Orechio's standing to appear with and for the legislative body that enacted the MOS is to be credited, then, it would seem necessary as a logical consequence, that the appropriate remedy for this Court is, not merely to dismiss the appeal, but rather to vacate the entirety of the proceedings below on the ground that there never was a proper adverse party-defendant.

two individuals, as well as the entire collegial bodies of the General Assembly and the Senate. (J.A. 53).

Messrs. Karcher and Orechio continued to act as the representatives of the 200th Legislature throughout the extended litigation before the court of appeals.[12] They continue to act in the same role on this appeal because their present interest in representing the majority that enacted the statute is identical to the interest they possessed at the time of intervention.[13] Indeed, who other than the presiding officers and leaders of the majority of the Legislature whose enactment is under constitutional attack are more proper representatives of that body?[14]

Appellees argue that this is an official capacity suit and that the current Legislature is the only real party-in-interest. (Mot. to Dism. or Aff. at 2). Appellants contend that this is not an official capacity suit and that Karcher and Orechio have a real and present interest in

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12 At the time that the court of appeals heard oral argument in this case, *Wallace v. Jaffree* was pending before this Court. Accordingly, the Third Circuit reserved decision (after initial oral argument on October 26, 1984) pending the disposition of *Jaffree*. Reargument did not occur until August 13, 1985 and the court of appeals decision was rendered on December 24, 1985. Had this matter proceeded in the court of appeals without the resulting protracted delay, it might have reached this Court before Messrs. Karcher and Orechio relinquished their titles of speaker and president, in which case the standing issue might not have arisen.

13 Mr. Karcher's current interest in representing the majority that passed the law is reflected in his letter to appellants' counsel of record dated April 29, 1986. In that letter, Mr. Karcher advised counsel that he was the only valid representative of the legislative body that enacted the statute. (Mot. to Dism. or Aff. App. 6a).

14 While arguably a motion for substitution of a party for purposes of prosecuting an appeal could have been made pursuant to Supreme Court Rule 40.1, such a motion would have been a redundancy for Messrs. Karcher and Orechio who already were joined as intervenors-defendants. Indeed, it would seem technically incorrect to require substitution of one who already is a party.

maintaining this suit, notwithstanding the loss of their titles of "speaker" and "president."[15]

By letters dated April 21, 1986 and April 29, 1986 to appellants' counsel of record, Mr. Hardwick and Mr. Russo purported to direct counsel to withdraw this appeal. (Mot. to Dism. or Aff. App. 4a; 5a). Their correspondence, however, does not indicate by what authority their directives were made. Indeed, they could not do so because the present presiding officers of the General Assembly and Senate have no such authority—legislative, constitutional or otherwise—to abate an appeal undertaken on behalf of the majority of the prior Legislature which passed the MOS.

Appellants agree with appellees that "[i]t is up to the legislature to determine when to defend its own interests." (Mot. to Dism. or Aff. at 13). The Legislature that voted for the law demonstrated its desire to defend the law by intervening. Moreover, there is nothing in the record to indicate that its interest in maintaining the defense no longer exists. Certainly, Messrs. Russo and Hardwick cannot speak on behalf of the parties who intervened below

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[15] It is evident that official-capacity suits involving administrative or executive persons are materially different from the situation presented herein. Where an executive branch party-defendant is succeeded in office, he generally has no continuing stake in the controversy but his successor has the viable ongoing interest in the outcome, as it will affect the scope or nature of his functions. See, for instance, *Acheson v. Fujiko Furusho*, 212 F.2d 284 (9th Cir. 1954); Wright, Miller & Kane, *Federal Practice and Procedure*, Civil 2d § 1960, at 570-572 (1986). In the legislative context, the parallel fails. The initial Legislature passes the legislation and the successor Legislature has no continuing function with respect thereto, unless and until it chooses to act, by way of repeal or modification. Given that successive Legislatures in New Jersey are separate and independent bodies, *Ex parte Hague*, 105 N.J. Eq. 134, 147 A. 220 (1929), and do not reenact prior statutes, there is simply no logical basis on which to assume that a successive Legislature has a greater or superior stake in the outcome of a legislative challenge than the Legislature that actually passed the statute under review.

in the absence of an expression by those parties indicating a desire to withdraw the appeal.[16]

Inasmuch as the current Legislature neither enacted the MOS statute nor intervened in this action, it equally lacks the power to moot this appeal by simply expressing, through its leaders, a desire not to join as an appellant. If the current legislative body is opposed to the MOS, its remedy is to repeal the statute.[17] Since the current Legislature has not chosen to do so, there is no basis from which to conclude that the position of the current Legislature (as opposed to its leadership) with respect to this appeal differs in any way from that of the majority that enacted the statute. In any event, the interest of the presently constituted Legislature never can rise to the level of the interest of the body that voted for the law. It was the vote of the prior Legislature, not the current one, that was,

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16 Indeed, even the current leaderships' positions may not truly reflect their own legislative judgments. Both Assemblyman Hardwick and Senator Russo, as members of the 200th Legislature, initially voted to enact the MOS (J.A. 384; 387) and Mr. Russo voted to override the Governor's subsequent veto. (J.A. 389). Even assuming their individual judgments have changed and each no longer supports the legislation, they are incapable of undoing their earlier votes through the method they have chosen in this action. Whether they have changed their minds or not, they are, in their current capacities, strangers to this appeal who cannot repeal the enactment nor moot this appeal by dint of their individualized expressions even as the Speaker of the current Assembly and the President of the current Senate.

17 This is not to say that the current Legislature could not be a proper party to this action; the issue presented, however, is whether it is the *only* proper party defendant. For the reasons expressed herein, it is respectfully submitted that the enacting Legislature has the paramount interest in the legislation and in the integrity of the legislative process under court scrutiny. Indeed, in this case, the current Legislature has placed itself in a position no different from that of the executive branch in New Jersey in the early stages of this proceeding—sitting on the sidelines and taking no official action.

in effect, improperly negated by the lower courts' pronouncements of unconstitutionality.[18]

The instant case is readily distinguishable from those cases which address the standing to appeal of individual defendants in official capacity suits. In *Bender v. Williamsport Area School District*, — U.S. —, 106 S.Ct. 1326 (1986), this Court held that the school board member was sued in his official capacity and had no interest in the suit as an individual. In contrast, Messrs. Karcher and Orechio were not sued in their official capacity. Rather, they intervened to represent the majority whose law was challenged. Moreover, while the school board member in *Bender* was found to have no personal stake in the outcome of the suit, the interests of Messrs. Karcher and Orechio as members of the majority who voted for the law still exist notwithstanding the subsequent loss of their presiding officer titles. Finally, *Bender* is inapposite because there the school board voted to forego the appeal, while here there was no such vote by the affected legislative body. Therefore, the proposition that "[g]enerally speaking, members of collegial bodies do not have standing to perfect an appeal the body itself has declined to take," *id.* at 1333, simply is not applicable in the instant case.

Similarly, the Court need not be concerned with the holdings of cases involving the standing of individual legislators to challenge statutes passed over their objection,[19] cases involving the standing of private individuals to per-

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[18] Similarly, the decisions of the district court and the court of appeals majority effectively nullified the vote of each individual legislator, such as that of Alan Karcher and Carmen Orechio, who voted for the passage of the law.

[19] *See, e.g., Koriath v. Briscoe*, 523 F.2d 1271 (5th Cir. 1975); *Poovey v. Edminsten*, 526 F.Supp. 759 (E.D.N.C. 1981) (state legislator has no standing to challenge constitutionality of statute for which he did not vote).

fect an appeal which a state has decided to forego[20] or cases involving intervention by the executive branch.[21] This case does not involve a challenge by a legislator who voted against an enactment, nor an individual with no direct interest in the outcome of the litigation. Likewise, this suit is not concerned with intervention by the executive branch. The unique facts presented here stem from the peculiar turn of events which occurred from the moment the law was enacted. The named defendants abandoned the law, leaving its defense to the legislative intervenors. The disposition of this matter was delayed in the court of appeals, and during that period, a successive Legislature was elected and convened, wherein appellants Karcher and Orechio were no longer presiding officers of the Legislature, though they remain legislators representing the same districts they represented during the term of the 200th Legislature. The new political leaders decided that *they* had no desire to join in the appeal. Yet throughout the entire course of these events, the legislation enacted by the majority was under attack and the interests of the majority and its representatives, Karcher and Orechio, remain unchanged.

The district court properly permitted the Legislature and its representatives to intervene to defend its legislation. The interests of the Legislature that enacted the law, and its representatives, Karcher and Orechio, have not dissipated through the political changes which occurred during the course of this litigation, and in fact are identical to those interests which led to intervention. Since the interests of

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20 *See, e.g., Diamond v. Charles,* — U.S. —, 106 S.Ct. 1697 (1986) (private individual had no standing to perfect an appeal which State of Illinois declined to take).

21 *See, e.g., Estate of Thornton v. Caldor, Inc.,* 472 U.S. 703 (1985) (acknowledging Connecticut's right to intervene to defend constitutionality of statute).

the parties are in no way meaningfully different on this appeal, this Court is presented with a live case or controversy and has jurisdiction to decide this appeal.

(B) As Proper Party-Defendants Below, Alan Karcher, Carmen Orechio and the 200th Legislature Have a Statutory Right to Maintain this Appeal.

No issue has been raised, much less a challenge made, contesting the undoubted standing of Messrs. Karcher and Orechio and the 200th Legislature in the court of appeals. In attacking the constitutionality of the MOS, the appellees called into question the very process by which the MOS was enacted and, in so doing, took aim at comments made by a handful of legislators for the putative purpose of establishing an illicit motivation on the part of the Legislature, as a whole, in passing the MOS. Clearly, the magnitude of the appellants' interests in defending the integrity of the legislative process was sufficient to allow for their intervention in the district court. Indeed, as is readily apparent from the oral argument on the intervention application, the appellees openly welcomed Karcher and Orechio and the 200th Legislature into the case. (Mot. to Dism. or Aff. App. 11a). In this Court, the appellants have the same interests and the same stake in the outcome of the litigation as they had in the courts below.

As proper parties in the court of appeals, Messrs. Karcher and Orechio, and, through them, the 200th Legislature have statutory authority to seek review in this Court under 28 U.S.C. § 1254(b), which authorizes an appeal to this Court "by a *party* relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, . . . of the United States" (emphasis added). Consequently, since Karcher and Orechio and the 200th Legislature were proper parties in the court of appeals, their statutorily authorized appeal has brought this case to this Court. *See, e.g., Director, Office of Workers' Compensation Programs,*

etc. v. Perini North River Associates, 459 U.S. 297, 304 (1983); *Diamond v. Charles,* — U.S. —, 106 S. Ct. 1697, 1708 (1986) (O'Connor, J., concurring).

(C) The Action of the Court Below, in Intrusively and Incorrectly Probing the Legislative Process by Which the MOS Was Enacted and by Holding the Law to be Invalid, Constitutes "Judicial Nullification" so as to Give Standing to the Majority of the 200th Legislature to Seek Appellate Review.

The right of the 200th Legislature to intervene herein was analogous to the recognized right of Congress to intervene when the executive branch declines to defend the validity of a statute. *See INS v. Chadha,* 462 U.S. 919, 940 (1983); *Ameron v. U.S. Army Corps of Engineers,* 787 F.2d 875, 888 n.8 (3d Cir. 1986). While that right alone was sufficient to initially confer standing on the legislative intervenors herein, an additional and distinct injury in fact has been visited upon them by the district court's erroneous inquiry into the legislative process and subsequent finding of unconstitutionality as to the MOS statute. That court's impermissible intrusion into the legislative process essentially nullified the votes of the majority of the 200th Legislature who supported the statute's enactment. The injury to the majority of the Legislature caused by the judicial nullification of their votes is sufficient to satisfy the standing requirement of Article III.

This Court has recognized that legislators, whose votes are nullified through the improper actions of the executive branch, have standing to challenge those actions. *See Coleman v. Miller,* 307 U.S. 433 (1939). That case involved a resolution for the ratification in the Kansas State Senate of a proposed amendment to the federal Constitution. Of the forty senators who voted on the resolution, twenty voted in favor of its passage and twenty voted against it. The Lieutenant Governor, who was the

presiding officer of the Senate and the individual empowered to break a tie vote, voted in favor of the resolution. Thereafter, twenty-one members of the Senate, including the twenty who voted against the resolution, and three members of the State House of Representatives, brought suit to challenge the authorization of the Lieutenant Governor to cast the tie-breaking vote. *Id.* at 436. The Supreme Court of Kansas upheld the right of the Lieutenant Governor to cast the deciding vote. *Id.* at 437.

On appeal, this Court rejected respondent's argument that the case involved "a mere intraparliamentary controversy," stating:

> Here, the plaintiffs include twenty senators, whose votes against ratification have been overridden and virtually held for naught although if they are right in their contentions their votes would have been sufficient to defeat ratification. *We think that these senators have a plain, direct and adequate interest in maintaining the effectiveness of their votes.*

Id. at 438. (emphasis added).

Here, of course, there was no explicit claim of illegal executive action as such, although the unique facts presented to the district court at the time of intervention related to the announced intention and actual failure of the executive branch to defend the law before the district court.[22] Thereafter, as a result of the district court's errant approach, there arose an issue of the propriety of judicial interference with the functional integrity of the legislative enactment process.

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[22] By failing to defend, the executive branch party-defendants in essence sought to give effect to the previous gubernatorial veto which the 200th Legislature had addressed through its actions on December 13, 1982 and December 16, 1982 when each house independently voted to override the veto. It is clear that this total absence of a party-defendant who would vigorously defend the law was the primary reason the district court properly permitted appellants' intervention. *See, e.g.*, Fed. R. Civ. P. 24(a)(2).

In *McRae v. Mathews,* the District Court for the Eastern District of New York addressed the issue of judicial nullification as an independent basis for intervention of members of Congress at the trial level. 421 F.Supp. at 533 (E.D.N.Y. 1976), *appeal dismissed, Buckley v. McRae,* 433 U.S. 916 and *vacated, Califano v. McRae,* 433 U.S. 916 (1977), *reh'g denied, Califano v. McRae,* 434 U.S. 881 (1977) and *on remand, McRae v. Califano,* 491 F. Supp. 630 (E.D.N.Y. 1980), *rev'd, Harris v. McRae,* 448 U.S. 297 (1980), *rehearing denied, Harris v. McRae,* 448 U.S. 917 (1980). In that case, plaintiffs challenged the constitutionality of a provision of the Federal Appropriation Act denying federal medicaid reimbursements for elective abortions. Despite the existence and participation of an executive branch party-defendant (Secretary of H.E.W.), two United States Senators and one member of the House of Representatives sought to intervene "in support of the legislation in their interest as Members of Congress seeking to protest their votes from judicial nullification . . . . " 421 F.Supp. at 540.

While the district court recognized the right of legislators to sue where the correctness of the process of enactment is challenged, it declined to extend that right to a situation where the sole challenge involves the constitutional validity of a properly enacted law. *Id.* at 540. In so doing, the district court expressed its concern that:

> To grant intervention on the ground of the members' participation in enacting the law would involve accepting as a principle that each member of the Congress has an interest to intervene in every case in which the substantive constitutionality of a provision in a federal enactment was drawn into question or, indeed in which the interpretation of a federal statute was in question.

Id. (citation omitted).

This Court has long endeavored to apply narrowly the principle of standing to the precise facts of each case. *Valley Forge Christian College v. Americans United for Separation of Church and State,* 454 U.S. 464, 489 (1982). The *McRae* court's concern that recognition of a legally cognizable interest based upon prospective judicial nullification would result in a plethora of legislator interventions is unfounded here; the interest of the 200th Legislature is not limited merely to the right to defend the constitutionality of a properly enacted statute, but now also involves an interest derived from the injury done to the legislators' votes as integral to the enactment process. The facts of this case are qualitatively different from *McRae.*

Unlike *McRae,* the facts presented herein are unique and unlikely to recur. Here, there is no prospective quality to the appellants' claim to standing on the basis of the lower court's judicial nullification of their actions. Appellants have shown that the district court's invalidation of their "purpose" through examination of their purported subjective motivations, as well as an improper re-evaluation of the wisdom of their activities, impermissibly impugned and nullified their legitimate legislative action. Thus, the district court's erroneous actions directly call into question the "efficacy of the legislator's vote as a vote to be counted in the legislative process." *McRae v. Mathews,* 421 F.Supp. at 540.

The injury sustained by the appellants as a result of the lower court's improper judicial nullification of their votes is sufficient to satisfy the standing requirements of Article III. Here, the appellants have suffered injury as a result of the district court's impermissible inquiry into the legislative process. *See Gladstone, Realtors v. Village of Bellwood,* 441 U.S. 91, 99 (1979). That injury is more than a "generalized grievance" shared by the public. *Warth v. Seldin,* 422 U.S. 490, 499 (1975); *see Gladstone,*

441 U.S. at 100. It is an injury unique to the appellants. Accordingly, the appellants have standing to litigate this matter based upon the judicial nullification of their votes.

II. THE COURT OF APPEALS MAJORITY ERRED AS A MATTER OF LAW IN HOLDING NEW JERSEY'S MOMENT OF SILENCE LAW UNCONSTITUTIONAL BASED UPON A FINDING THAT THE MOS LACKED ANY PLAUSIBLE SECULAR PURPOSE.

Any legal analysis of the subject statute must start with the indisputable fact that it is constitutionally neutral on its face—it neither requires nor implicates any manner of religious exercise. In order to skirt this seemingly insurmountable legal barrier, the district court engaged in a free-wheeling taking of bits and shards of "evidence" —including selected newspaper clippings and extra-legislative statements by a handful of legislators—leading to an apparent conclusion as to a purported hidden subjective religious motive by the sponsors, which, in turn, was then attributed to the entire New Jersey Legislature. On this jerry-built basis, the MOS was found by the courts below to be unconstitutional.

(A) The Constitutional Standard: The Three-Part Test

In analyzing whether the MOS violated the proscription of the Establishment Clause, the courts below purported to be guided by the three-part test first enunciated by this court in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). In *Lemon*, this Court stated:

> First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances or inhibits religion . . .; finally, the statute must not foster 'an excessive governmental entanglement with religion."

Id. at 612-613.

To withstand attack under the Establishment Clause, the challenged state action must satisfy each of the three criteria. The court of appeals had no difficulty in reversing the district court's conclusion that the MOS failed both the "effect" and "entanglement" prongs of the *Lemon* test, but the court of appeals majority erred in ratifying the district court's approach that to satisfy the secular legislative purpose requirement there must be an "overwhelmingly obvious and important secular purpose" (J.S.A. 91a), and thereby erroneously concluded that the MOS had no sufficient secular purpose.

In analyzing the MOS under the purpose prong of *Lemon*, while traveling different routes, both the majority of the court of appeals and the district court fundamentally erred in interpreting and applying this Court's "purpose" requirement. The panel majority utterly failed to engage in any meaningful analysis of this Court's prior opinions addressing "purpose", and instead ultimately abdicated its responsibility by accepting without question "the trial court's finding that the legislature's purpose in enacting N.J.S.A. 18A:36-4 was religious."[23] (J.S.A. 27a). Curiously, the majority did not in any way question the accuracy of Judge Becker's observation in his dissent, that "[t]he evidence simply does not demonstrate that the statute lacks any secular purpose." (J.S.A. 59a). Judge Becker's analysis of "purpose" was very different from

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[23] It would be sophistic to conclude that this statement in the trial court's opinion was, on the basis of this record, a factual finding sufficient to prevent review by the appellate courts. At a minimum, it is a mixed question of fact and law. Given, however, the constitutional issues inherent in the merits of this case and further recognizing that the manner and scope of judicial review herein employed raises further constitutional concerns, it is respectfully suggested that any such "finding" should be subject to appellate circumspection. Cf. *Bose Corp. v. Consumers Union*, 466 U.S. 485 (wherein this Court exercised plenary review of lower court's finding of actual malice in libel case).

that of the majority and, it is submitted, was consistent with and faithful to this Court's prior instructions concerning the proper meaning and application of the purpose prong. (J.S.A. 43a-60a).

(B) The Majority of the Court of Appeals Erred in its Interpretation and Application of the Purpose Prong of this Court's Tripartite Establishment Clause Test by Accepting and Endorsing the Basis by Which the District Court Determined that the MOS Lacked any Plausible Secular Purpose.

As pointed out above, the court of appeals decision, validating the district court's "factual" finding of no secular purpose, incorporated a number of significant errors made by the district court in arriving at that conclusion. In conducting its purpose examination, the district court purported to peer behind the face of the MOS in order to reject: (1) the explicitly neutral language of the statute, and (2) the plausible secular purpose that was both evident from the face of the statute and confirmed by the proofs presented by the Legislature. (J.S.A. 90a-91a).

On the basis of its conclusion that the MOS had "no overwhelming secular purpose" (J.S.A. 91a), the district court engaged in a wholly unprecedented judicial search for legislative purpose in which it entertained evidence relating to the wisdom and necessity of the MOS. (J.S.A. 83a-85a; 87a-88a). In so doing, the court went beyond its proper judicial role of evaluating and deciding the legal issues presented in accordance with the objective evidence consisting of the plain language of the law, the plausible secular purpose established by the Legislature, and the appropriate constitutional standard.[24]

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[24] Under the guise of assessing legislative purpose, the district court made assumptions outside the record concerning

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Instead, the district court purported to make findings concerning issues in an area long recognized as not only being beyond its competence and authority (*see San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 31-32 (1973)) but, moreover, totally irrelevant to a determination whether the MOS satisfied the appropriate constitutional standards. *Zorach v. Clauson*, 343 U.S. 306 (1952).

The evidence at trial presented by the Legislature established: (1) a plausible pedagogical purpose for the MOS (J.A. 352-361; J.S.A. 83a), and; (2) empirical data which established that a moment of silence exercise in operation actually accomplished the identified pedagogical purpose. (J.A. 313-326). Though none of plaintiffs' witnesses had either observed or participated in a moment of silence exercise, plaintiffs presented witnesses who opined that a moment of silence would have marginal educational utility at best (J.A. 188; 219) and testimony from educational officials who believed that there was no educational value to a moment of silence exercise. (J.A. 238-239; 303-304).

The district court resolved the differences in favor of the plaintiffs, by relying upon plaintiffs' proofs as to the

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the history of school prayer in New Jersey (J.S.A. 86a-87a) and New Jersey demographics (J.S.A. 85a); permitted the introduction of legislation considered by prior independent Legislatures (J.S.A. 86a); received the selected hearsay utterances of a handful of legislators who spoke during (and outside) legislative committee meetings and floor debates leading to the enactment of the MOS (J.A. 368-372; App. Vol. V); and imposed a new requirement that, in order for the court to accept the plausible secular purpose identified by the appellants at trial, that purpose must be shown to have been specifically and explicitly discussed and considered by the Legislature when it enacted the MOS. (J.S.A. 83a-84a; 87a-88a). In short, what the district court imposed upon the Legislature, in effect, was a duty to establish the "actual subjective intent"—or perhaps more accurately, the "collective subjective motive"—of the legislators who enacted the MOS.

wisdom of the moment of silence. To buttress its conclusion, the court pointed to the purported failure of the Legislature to present evidence that schools were unable to accomplish the same purpose through other mechanisms. (J.S.A. 87a). In relying on such considerations, the court violated one of the most settled rules of constitutional adjudication—provided an enactment is within the constitutional power of a Legislature, a belief that an act of legislation is ineffective or unnecessary is a legally insufficient and improper basis upon which to conclude that the act was unconstitutional. *See Schweiker v. Hogan*, 457 U.S. 569, 589 (1982); *Daniel v. Family Secur. Life Ins. Co.*, 336 U.S. 220 (1949). As Justice Douglas pointed out in *Zorach v. Clauson*, 343 U.S. at 314, the rule is no different in an Establishment Clause case:

> This program may be unwise and improvident from an educational or community viewpoint. That appeal is made to us on a theory previously advanced, that each case must be decided on the basis of 'our own prepossessions.' See *Illinois ex rel McCollum v. Board of Education*, supra (333 U.S. p.238, . . .). Our individual preferences, however, are not the constitutional standard.

This intrusive and unwarranted perspective of the district court as to the necessity, *vel non*, of the MOS—ultimately translating into an apparent cynicism as to the personal philosophical and subjective motives of the individual sponsoring legislators—runs throughout the proceedings below. Eventually, it leads to the imposition by the district court of its view as to what the duly elected legislative branch should or should not do as opposed to what it constitutionally can or cannot do. This new standard of "scrutiny" has never been sanctioned by this Court.

While the district court paid lip service to the Legislature's position that "constitutional analysis of legislative

purpose does not involve a judicial inquiry into supposed illicit legislative motive" (J.S.A. 91a), it nonetheless engaged in a wholly unprecedented inquiry into the alleged subjective motivation of some legislators in sponsoring the MOS and concluded from incomplete and highly incompetent fragments of "evidence" that the "history of this kind of legislation and the circumstances of the adoption of this particular bill point inescapably to an essential religious purpose." (J.S.A. 91a-92a). To reach this bald conclusion, the court relied not only on the fragmentary hearsay utterances of a handful of legislators,[25] but considered, without any rational explanation as to their relevancy, items of legislation that had been introduced during sessions of prior independent legislatures. (J.S.A. 86a).

An examination of the district court's legal analysis reveals that the court had absolutely no precedential support for its unique procedure. Indeed, the only justification offered was a labored attempt to distinguish the case before it from the controlling principles enunciated by this Court in *United States v. O'Brien*, 391 U.S. 367 (1968). That distinction between "the motives and purposes of individual legislators and an institutional purpose" (J.S.A. 91a) was used by the district court as justification for its departure from the clear admonitions announced in *O'Brien*. As construed by the district court, *O'Brien* stood for the proposition that it was only where a statute on its face contained an "overwhelmingly obvious and im-

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[25] The New Jersey Legislature consists of two houses: an Assembly which has a membership of 80 Assemblypersons and a Senate which has a membership of 40 Senators. During the legislative process, the MOS was voted upon by as many as 74 Assemblypersons and 35 Senators. All told, the plaintiffs presented fragments of statements from 5 Assemblypersons and 11 Senators not all of whom even reportedly stated anything relevant. (App. Vol. V).

portant secular purpose" (J.S.A. 91a) that a court was prohibited from exploring subjective legislative motivations. In this regard, the district court was plainly wrong.[26] No such distinction was recognized by *O'Brien* nor has it been recognized by any court which the district court could identify.[27] Indeed, there is no such distinction.

The district court's misreading of *O'Brien* was carried forward and compounded by the majority opinion of the court of appeals. In the process, the clear instruction of this Court's decision in *O'Brien* was further confused and drained of meaning. As read by the court of appeals majority, *O'Brien* authorized the use of legislator statements (apparently from whatever source derived) whenever the court was required to determine legislative purpose. (J.S.A. 27a n.9). In arriving at this conclusion, the panel opinion misquotes the *O'Brien* opinion and, as pointed out by Judge Becker (J.S.A. 50a n.9). misreads the clear limitations identified in *O'Brien*. The uniquely limited circumstance in which the *O'Brien* Court would sanction such an inquiry has no application whatsoever to this Establishment Clause controversy. *Cf. Washington v. Davis*, 426 U.S. 229, 244 n.11 (1976); *Lynch v. Donnelly*, 465 U.S.

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[26] The analytical basis employed by the district court in applying its distinction is entirely circular. That is, the court reviewed and relied upon the individual "motive evidence" in order to conclude that the MOS lacked an "overwhelmingly obvious and important secular purpose" which in turn permitted it to escape the evidential limitations of *O'Brien*. Thus, it used the legally improper "evidence" in order to reach a legal/factual conclusion that it could consider the selfsame "evidence". Moreover, purporting to draw a distinction between "motives" and/or "purposes of individual legislators" and "institutional legislative purpose," it then used the former to prove the latter, thereby obliterating the putative distinction.

[27] This Court in *O'Brien* specifically rejected a similar argument that had been advanced on the basis of two of its earlier decisions, *Grosjean v. American Press Co.*, 297 U.S. 233 (1936) and *Gomillion v. Lightfoot*, 364 U.S. 339 (1960). *See United States v. O'Brien*, 391 U.S. at 384-385.

668 (1984). And even where such an inquiry might be authorized, there is absolutely no support for opening the evidentiary floodgate to accept the types of utterly unreliable hearsay that the district court considered. (App. Vol. V).

Starting as early as the decision in *Fletcher v. Peck,* 10 U.S. 87 (1810), wherein this Court refused to void the Georgia Legislature's sale of lands on the theory that its members were corrupted by impure motives in passing the legislation, it has always been well settled that judicial inquiry into subjective legislative motives represents an improper intrusion into the affairs of another branch of government which the courts should not undertake. In *McCray v. United States,* 195 U.S. 27, 56 (1904), it was noted that "[t]he decisions of this court from the beginning lend no support whatever to the assumption that the judiciary may restrain the exercise of lawful power on the assumption that a wrongful purpose or motive has caused the power to be exerted." *Accord, Arizona v. California,* 283 U.S. 423, 455 (1931) (in which Justice Brandeis cites a long list of cases holding that the courts may not inquire into the motives that induce legislative bodies to enact laws). The district court's procedure, as ratified by the court of appeals majority, is exactly the type of impermissible inquiry this Court clearly rejected in *O'Brien:*

> Inquiries into congressional motives or purposes are a hazardous matter. When the issue is simply the interpretation of legislation, the Court will look to statements by legislators for guidance as to the purpose of the legislature, because the benefit to sound decision-making in this circumstance is thought sufficient to risk the possibility of misreading Congress' purpose. It is entirely a different matter when we are asked to void a statute that is, under well settled criteria, constitutional on its face, on the basis of what fewer than a handful of Congressmen said about it.

> What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork. We decline to void essentially on the ground that it is unwise legislation which Congress had the undoubted power to enact and which could be reenacted in its exact form if the same or another legislator made a "wiser" speech about it.

O'Brien, 391 U.S. at 383-384. *Accord, Palmer v. Thompson*, 403 U.S. 217, 224-225 (1971).

The procedure adopted by the district court is totally inconsistent with this Court's pronouncements as to the judiciary's proper scope of review in determining the constitutionality of state legislation.[28] As Justice Black noted in *Palmer v. Thompson*, there is an element of futility in an approach which would invalidate a law on the basis of the illicit subjective motivations of its supporters.

> If, the law is struck down for this reason, rather than because of its facial content or effect, it would presumably be valid as soon as the legislature or relevant government body repassed it for different reasons.

Id. at 225.[29]

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[28] The *O'Brien* analysis is particularly applicable to the district court's reliance upon prior legislative proposals (spanning 10 years) as constituting proof of an illicit subjective legislative motivation for the MOS. (J.S.A. 86a-87a). First, the district court failed to provide any rational way to determine how the acts of prior legislators and independent legislative bodies indelibly mark the subsequent activities of an independent legislative body. Secondly, even assuming *arguendo* that there were certain supporters of the prior legislation who also voted for the MOS, the district court failed to explain how it could determine that such legislators' subjective motives had remained stagnant. And finally, as made clear by *O'Brien*, even further assuming that the prior legislators who had supported the earlier legislation had maintained their subjective views (and that those views were clear) the district court failed to explain how those views could be imputed to the multitude of other legislators who voted for the MOS.

[29] The problem involved with judicial inquiries into legislative motives has been the subject of academic commentary.

(Continued on following page)

The district court's invasive inquiry in the instant case was completely contrary to all of the guidance that has been supplied by this Court and was clearly in error.

In affirming the district court's purpose finding, the court of appeals majority, *sub silentio,* endorsed the trial court's unprecedented purpose analysis. In so doing, the majority totally ignored this Court's teaching in *Mueller v. Allen,* 463 U.S. at 394-395, that the judiciary should be "reluctant to attribute unconstitutional motives to the States, particularly when a plausible secular purpose for the State's program may be discerned from the face of the statute."

Moreover, in ratifying the district court's probing to find religious purpose—as opposed to accepting a clearly plausible secular purpose—the majority completely ignored expressions from members of this Court which support the proposition that a facially neutral moment of silence statute presumptively has a secular purpose. *See Abington School Dist. v. Schempp,* 374 U.S. 203, 281 (1963) (Brennon, J., concurring); *see also Wallace v. Jaffree,* 472 U.S. at 38; at 63 (Powell, J., concurring); at 72-73 (O'Connor, J., concurring).[30]

(Continued from previous page)

See Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics (1962).* Professor Bickel observes that "it is simply unthinkable that members of legislative majorities should from time to time be subject to cross-examination . . . regarding their state of mind when they voted . . . ." Bickel, *supra,* at 215.

[30] Likewise, many constitutional scholars have suggested that moment of silence statutes are constitutional. *See* Tribe, *American Constitutional Law* § 14-6 at 829 (1978); Freund, *The Legal Issue, in Religion and the Public Schools* 23 (1965); Choper, *Religion in the Public Schools; A Proposed Constitutional Standard,* 47 *Minn. L. Rev.* 329, 371 (1963); Kauper, *Prayer, Public Schools and the Supreme Court,* 61 *Mich. L. Rev.* 1031, 1041 (1963).

Although the majority opinion acknowledges, as it must after *Jaffree,* that "in the abstract" the Supreme Court would uphold a statute such as the moment of silence (J.S.A. 26a), ultimately it concluded that the expressions of the various Justices in *Jaffree* did not provide a clear answer for the case before it. Instead, by accepting the district court's finding of no secular purpose, and by ignoring the clear guidance of this Court as to the acceptability of a "plausible" secular purpose to satisfy the "purpose" inquiry, the majority ironically concluded that its decision must be guided by *Estate of Thornton v. Caldor, Inc.* (a case decided principally under the effect prong) and invalidated the MOS as unconstitutional.[31]

Thus, despite its conclusion that the MOS is a neutrally worded statute which is facially and operationally constitutional (and could not be found to endorse prayer), the court of appeals nonetheless found that the MOS violated the Establishment Clause, solely by embracing the district court's "finding" that the law lacked a secular purpose. In so ruling, the court of appeals sanctioned not only the trial court's unjustified rejection of Supreme Court decisions endorsing the validity of a "plausible" secular purpose, but more importantly, approved the district court's unprecedented search for subjective legislator motive as an answer to the Supreme Court's "purpose" test.

In the end, both the court of appeals and the district court transmogrified this Court's "secular purpose" standard into "a subjective legislator motive" test—a test and standard that has never been recognized or announced by

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[31] In the process, the majority fails to mention, much less address, how it escapes the application of the presumption of constitutionality identified by Judge Becker in his dissent. (J.S.A. 38a-43a).

this Court.[32] *See McGowan v. Maryland*, 366 U.S. 420, 466 (1961) (Frankfurter, J., concurring).

(C) Under a Proper Purpose Analysis, Giving Due Regard to all of this Court's Teachings Under the Establishment Clause, the MOS is Constitutional.

The forceful dissent of Judge Becker in the court of appeals explicitly found the MOS to be constitutional:

> In my view, a permissive and facially neutral statute such as the New Jersey moment of silence is presumptively constitutional; that the presumption is all the stronger when, as here, the enactment passes the entanglement and effects test of *Lemon* .... (J.S.A. 60a).

As pointed out by Chief Justice Rehnquist, the *Lemon* test's "secular purpose prong has proven mercurial in application because it has never been fully defined" nor has this Court ever "fully stated how the test is to operate." *Wallace v. Jaffree*, 472 U.S. at 108 (Rehnquist, J., dissenting). Despite this shortcoming, Justice Powell has observed that the *Lemon* standard itself is the "only coherent test a majority of the Court has ever adopted" in analyzing an Establishment Clause case. *Id.* at 63 (Powell, J., concurring). Indeed, in only two cases since enunciation of the tripartite test, has this Court resolved an Establishment Clause issue without applying the *Lemon* test. *See Marsh v. Chambers*, 463 U.S. 783 (1983); *Larson v. Valente*, 456 U.S. 228 (1982). In reviewing this

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[32] As a result of its reinterpretation of the MOS as a permissive statute, the panel majority devotes considerable time to the discussion of the concept of "accommodation." (J.S.A. 9a-15a). Ultimately, however, the majority recognizes that this characterization does not resolve the constitutional issue (J.S.A. 15a) and in the end the discussion of accommodation is essentially irrelevant to its determination under the purpose prong. It is beyond dispute, however, that if, as urged by the Legislature, the majority is wrong as to purpose, than its "effect" and "entanglement" analyses are nonetheless as valid for a statute with a secular purpose as for one viewed as an accommodation.

Court's Establishment Clause decisions, one thing is clear: the Court's purpose inquiry will start with the statute itself. In fact, the decisions of this Court reflect that generally the Court's examination of purpose has not strayed from the face of the enactment. *See, e.g., Committee For Public Education v. Nyquist,* 413 U.S. 756, 773 (1973) ("We need touch only briefly on the requirement of a secular purpose. As the recitation of legislative purposes appended to New York's law indicates, each measure is adequately supported by legitimate, nonsecterian state interest."); *Sloan v. Lemon,* 413 U.S. 825, 829-830 (1973); *Lemon v. Kurtzman,* 403 U.S. at 613.

This Court recently stated that the legislative purpose requirement is violated "only" when the governmental activity was "motivated wholly by religious considerations":

> The court has invalidated legislation or governmental action on the ground that a secular purpose was lacking but *only* when it has concluded there was no question that the statute or activity was motivated *wholly* by religious considerations. See, *e.g., Stone v. Graham, supra,* at 41; *Epperson v. Arkansas,* 393 U.S. 97, 107-109 (1968); *Abington School District v. Schempp, supra,* at 223-224; *Engel v. Vitale,* 370 U.S. 421, 424-425 (1962). Even where the benefits to religion were substantial, as in *Everson, supra; Board of Education v. Allen,* 392 U.S. 236 (1968), *Walz, supra,* and *Tilton, supra,* we saw a secular purpose and no conflict with the establishment clause.

Lynch v. Donnelly, 465 U.S. at 680 (emphasis added).

Similarly, *Wallace v. Jaffree* reiterated that the purpose requirement is violated only if a law "is *entirely* motivated by a purpose to advance religion" and is *not* violated if "motivated in part by a religious purpose." 472 U.S. at 56. Justice Powell observed in *Jaffree* that only after a court is "unable to discern an arguably valid

secular purpose" would the Court be required "by our precedents to hold that the statute fails the first prong of the *Lemon* test." 472 U.S. at 66 (Powell, J., concurring).

While Judge Becker in his dissent correctly looked for and found a secular purpose to the MOS,[33] the majority of the court of appeals erroneously assumed that the secular legislative purpose requirement requires a "overwhelmingly secular purpose." (J.S.A. 91a).

While a statute must satisfy each part of the tripartite test, the purpose prong has rarely been determinative of the inquiry, since it may be satisfied by a plausible secular purpose. Most recently, in *Wallace v. Jaffree*, 472 U.S. at 38 (statute permitting public school teachers to observe a one minute period of silence to be used by students for meditation *or voluntary prayer*) this Court held, after distinguishing the Alabama statute under review from an earlier Alabama law—the text of which is not significantly different from New Jersey's moment of silence law—that the later law was unconstitutional because a plausible secular purpose could not be discerned from its face nor was any non-religious reason for the statute's enactment offered or identified. In *Stone v. Graham*, 449 U.S. 39, 42 (1980) (statute requiring posting of ten commandments), this Court rejected a statement of secular purpose placed on the face of the statute because of the *inevitable* religious effect of posting such an "undeniably sacred text." In *Stone*, the Court did not peer behind the statute, but instead held that the use of an undoubted religious symbol served to define the "purpose" of the statute as a matter of law—subjective intent to the contrary notwith-

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[33] "The single unambiguous piece of evidence—the face of the statute itself—attests to the secular motives of the legislators. Parts of the testimony of the witnesses who attended the hearings also support this conclusion." (J.S.A. 58a).

standing.[34] Finally, in *Epperson v. Arkansas*, 393 U.S. at 107 (statute enacted by popular referendum barring the teaching of evolution), this Court invalidated the statute because no discernable secular purpose could be inferred—and none was suggested "other than the religious views of some of its [the state's] . . . citizens."

In none of this Court's decisions has the Court attempted to intrude into the area of subjective legislator motive when faced with a facially neutral, unambiguous statute.

The decisions of this Court demand that judicial inquiry into the purpose of a Legislature in enacting a law, such as the MOS, be limited. *See Everson v. Board of Education*, 330 U.S. 1, 6 (1947) (courts must exercise "the most extreme caution" in assessing whether a state statute has a proper public purpose); *McGowan v. Maryland*, 366 U.S. at 466 (Frankfurter, J., concurring).[35] In *Jaffree*, Justice O'Connor commented on the scope of judicial review into legislative purpose: "If a legislature expresses a plausible secular purpose for a moment of silence statute in either the text or the legislative history, or if

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[34] While the purpose prong was not expressly discussed in this Court's decision in *Estate of Thornton v. Caldor, Inc.*, both the clear language of the statute, as well as the inevitable operative effect (favoring Sabbath observers) support the foregoing view. Thus through the use of its "effect" test, the Court has been able to resolve the issue without search for subjective legislator motivation. Indeed, in *Jaffree*, Justice O'Connor expressly suggested that where reliable legislative materials are not available to call a close case, the inquiry under the "effect" prong should serve to decide those cases where the validity of an expressed secular purpose is in doubt. *See Wallace v. Jaffree*, 472 U.S. at 76.

[35] As noted in *S&E Contractors v. United States*, 406 U.S. 1, 14 n.9 (1972), the rationale for a court's caution in construing the legislative purpose behind a given law "is the caveat of Mr. Justice Holmes, 'We do not inquire what the legislature meant; we ask only what the statute means.' The Theory of Legal Interpretation, 12 *Harv. L. Rev.* 417, 419."

the statute disclaims an intent to encourage prayer over alternatives during a moment of silence, then courts should generally defer to that stated intent." *Id.* at 74-75 (O'Connor, J., concurring). Also in *Jaffree,* Chief Justice Burger observed this Court's long established precedent of "determining legislative purpose from the face of a statute as a whole." *Id.* at 86 (Burger, C.J., dissenting).

The New Jersey Legislature's purpose of providing public school students with a transition period at the commencement of the school day is manifestly constitutional, particularly when compared with other governmental activities for which this Court has found sufficient secular purposes.[36]

Here, the district court and the majority of the court of appeals simply chose to ignore all of this Court's teachings pertaining to the limited scope of an examination for legislative purpose. More importantly, their collective decisions reveal a fundamental lack of understanding of this Court's "purpose" inquiry in a constitutional setting. No attempt was made to determine the legislative purpose from the face of the neutral statute nor was any deference accorded to the "plausible" secular purpose identified by the Legislature. Instead, the district court veered in another direction under an unsanctioned standard which it viewed as permitting it to rely on irrelevant evidence concerning the lack of wisdom, necessity and efficacy of the

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[36] This Court has upheld various forms of financial aid to religious schools or to their students or parents, e.g., *Mueller v. Allen,* 463 U.S. 388 (1983); *Committee For Pub. Educ. v. Regan,* 444 U.S. 646 (1980); *Everson v. Board of Educ.,* 330 U.S. 1 (1947); a governmental Christmas display with nativity creche, *Lynch v. Donnelly,* 465 U.S. 668 (1985); Sunday closing laws, *McGowan v. Maryland,* 366 U.S. 420 (1961); equal access by religious organizations to public university facilities, *Widmar v. Vincent,* 454 U.S. 263, 271-272 (1981); and certain released time from public school programs for religious instruction, *Zorach v. Clauson,* 343 U.S. 306 (1952).

MOS; enabling it to patch illogical inferences on the basis of other attempts by earlier independent New Jersey Legislatures to return prayer to the public schools; and most disturbingly, permitting it to entertain the introduction of a hodge-podge of inadmissible hearsay comments from a handful of legislators in order to arrive at its conclusion that the MOS lacked an "overwhelmingly secular purpose."

When analyzed under the principles recited above, it is evident that both the district court and the majority of the court of appeals erred not only in understanding the proper scope of the purpose inquiry, but also in misapplying a number of fundamental decisions of this Court guiding inquiry in an Establishment Clause challenge.

III. THE COURT OF APPEALS ERRED IN APPLYING A "CLEARLY ERRONEOUS" STANDARD TO REVIEW THE TRIAL COURT'S "FACTUAL" DETERMINATION THAT THE STATUTE LACKS A SECULAR PURPOSE.

The court of appeals majority, employing a clearly erroneous standard of review (FED.R.CIV.P. 52a), let stand the district court's finding that the New Jersey Legislature's purpose in enacting N.J.S.A. 18A :36-4 was religious. In so doing, the court completely overlooked the "well-settled and respected rule" that in cases raising First Amendment issues, an appellate court has an obligation to make an independent examination of the whole record. *Bose Corp. v. Consumers Union*, 466 U.S. at 498-499.

That well-settled rule which this Court articulated in *Bose* should have been applied in this First Amendment Establishment Clause controversy to the finding by the district court that the moment of silence legislation lacked any secular purpose. Independent appellate

review is particularly appropriate in the instant case because the finding of no secular purpose (1) involves the ultimate constitutional fact which goes to the heart of the purpose prong of the *Lemon* test; (2) directly implicates the constitutional claims of the parties; and (3) at the very least, involves a mixed question of fact and law. When the record in this matter is reviewed *de novo,* it is abundantly clear that the trial court's finding of no secular purpose cannot stand. However, as demonstrated by Judge Becker's dissent, even under a clearly erroneous standard, the finding of no secular purpose must be rejected by this Court.

In *Bose,* this Court emphasized that in cases involving substantial constitutional rights, an appellate court is required to independently review the entire trial court record in order to preserve the liberties established by the United States Constitution. The *Bose* court exercised plenary review of a lower court's finding of actual malice in a libel case. It specifically noted that the requirement of independent appellate review "is a rule of federal constitutional law" and "reflects a deeply held conviction that judges—and particularly Members of [the Supreme] Court—must exercise such review in order to preserve the precious liberties established and ordained by the Constitution." 466 U.S. at 510-511.

Although *Bose* involved a determination of whether a speaker had "actual malice", such a finding is, in a constitutional sense, identical to a determination of whether a statute has a secular purpose; both are important "constitutional facts" which presuppose a legal standard and have potentially grave effects on First Amendment rights.

The determination of whether a statute has a secular purpose goes to the very heart of this matter. It involves not only an analysis of the facts presented but also a com-

plete understanding and appreciation for the First Amendment rights directly and inextricably implicated. As Judge Becker in his dissent noted, "[d]istinguishing what is religious from what is secular is a process as overlaid with constitutional considerations as deciding the difference between protected and unprotected speech." (J.S.A. 46a).[37]

At a minimum, the finding of no secular purpose by the trial court involved a mixed question of law and fact, thereby warranting independent appellate review. It has long been established that independent appellate review is appropriate where "a conclusion of law as to a federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the federal question, to analyze the facts." *Fiske v. Kansas,* 274 U.S. 280, 285-286 (1927).

The standard of review employed by the court of appeals majority is contrary to decisions of this Court, decisions of the Third Circuit in other cases, as well as the decision of other courts of appeals. In this Court's more recent Establishment Clause opinions, this Court has implemented, albeit *sub silentio,* a plenary review standard. *See e.g., Bob Jones University v. United States,* 461 U.S. 574, 605 n.32 (1983)[38]; *Lynch v. Donnelly,* 465 U.S. 668 (1984); *Estate of Thornton v. Caldor, Inc.,* 472 U.S. 703 (1985); *Witters v. Washington Dept. of Services for the Blind,* — U.S. —, 106 S. Ct. 748 (1986); *Munro v. Socialist Workers Party,* — U.S. —, 107 S. Ct. 533 (1986).

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[37] Judge Becker refused to limit *Bose* to cases involving free speech, finding that "[t]he constitutional prohibition of established religion is surely as important as the guarantee of freedom of speech." (J.S.A. 47a).

[38] *Bob Jones* was followed by the Third Circuit in *Presbyterian and Reformed Publishing Co. v. Commissioner of Internal Revenue,* 743 F.2d 148, 158 n.9 (3d Cir. 1984) where the court held that the Tax Court's determination of whether the organization had a tax-exempt purpose was subject to plenary review.

Similarly, in *Bender v. Williamsport Area School District*, 741 F.2d 538 (3d Cir. 1984), *vacated* 106 S. Ct. 1326 (1986), the Third Circuit acknowledged that when presented with "constitutional facts," an appellate court is free to draw its own inferences from the record. 741 F.2d at 542 n.3. Significantly, and in sharp contrast to the panel which decided this matter, the Third Circuit in *Bender* recognized that independent appellate review was appropriate in cases directly implicating constitutional and, in particular, First Amendment rights. *Id.*[39]

The Supreme Court's decision in *Bose* was a reaffirmation of the well established principle that questions of constitutional fact compel an appellate court's *de novo* review of the record. As the *Bose* court explained:

> This Court 'has an obligation to test challenged judgments against the guarantees of the First and Fourteenth Amendments, and in doing so, 'this Court cannot avoid making an independent constitutional judgment on the facts of this case.'

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[39] Other courts of appeals have also refused to be bound by the clearly erroneous standard when presented with First Amendment issues. In *Brasslett* v. *Cota*, 761 F.2d 827 (1st Cir. 1985), the plaintiff, a public employee, claimed that he was discharged in violation of his First Amendment rights for remarks he made during a television interview. Noting that *Bose* reaffirmed the rule of independent appellate review historically applied in First Amendment cases, the First Circuit undertook an independent review of the district court's findings of fact regarding plaintiff's statements to the press—the nature of the plaintiff's speech and the impact of that speech on the defendants ability to perform their public responsibilities were protected under the First Amendment. *Accord*, *McMullen* v. *Carson*, 754 F.2d 936 (11th Cir. 1985). *See also United States* v. *Merrill*, 746 F.2d 458, 463-464 (9th Cir. 1984) (different levels of appellate review in obscenity case for each prong of the test set forth in *Miller* v. *California*, 413 U.S. 15 (1973)); *Lebron* v. *Washington Metro Area Transit Authority*, 749 F.2d 893 (D.C. Cir. 1984) (where plaintiff claimed violation of First and Fourteenth Amendment rights when defendant refused to allow him to display his poster which criticized the Reagan administration; the court independently examined the whole record, following *Bose*).

466 U.S. at 508 n.27 (quoting *Jacabellis v. Ohio*, 378 U.S. 184, 190 (1964) (opinion of Brennan, J.).[40]

The court of appeals panel majority, in contradiction to a number of decisions by other federal appellate courts (including decisions by other panels of its own court), implemented the wrong standard of review which, as the dissent persuasively points out, it then misapplied in the instant case. (J.S.A. 27a; 58a-60a). In so doing, the majority purported to escape its responsibility to correct the fundamental errors that permeated the district court's implementation of this Court's "purpose" test.

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CONCLUSION

For the reasons expressed herein and on the basis of the record, it is respectfully urged that this Court review this case and reverse the decision below. This case presents the vehicle for resolving finally the troublesome issue of the permissibility of a moment of silence as a part of opening school ceremonies, as well as providing the opportunity for definitively articulating the proper scope and manner of review of state legislative actions by the federal courts. Left untouched, the decisions on appeal authorize and justify a constitutionally incautious scrutiny by the judiciary of the legislative process. In bringing the matter to this Court, appellants, Alan Karcher and Carmen

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[40] More recently, in *Miller v. Fenton*, — U.S. —, 106 S. Ct. 445, 452 (1985), the Court refused to "abandon the Court's long-standing position that the ultimate question of the admissibility of a confession merits treatment as a legal inquiry requiring plenary, federal review." The Court reversed the Third Circuit's decision, which had employed the clearly erroneous standard of Rule 52(a). *Miller*, 741 F.2d at 1464 (3d Cir. 1984). It is noteworthy that Judge Gibbons dissented, apparently believing that less deference should be afforded the trial court in voluntary confession cases than in cases implicating First Amendment rights.

Orechio, the principal defendants-protagonists throughout these proceedings, maintain and sustain a legally cognizable interest, sufficient to support continuing justiciability of this matter which is of unquestioned public concern and import.

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